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SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 72-1639

BRAD SIMON BABICH and
JAMES M. JOHNSON,
Petitioners,

v.

UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To The
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HARRY E. CLAIBORNE
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Las Vegas, Nevada 89101

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To The

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners, BRAD SIMON BABICH and JAMES M. JOHNSON, pray that a Writ of Certiorari issue to review the final Order and Judgment of the United States Court of Appeals for the Ninth Circuit rendered in these proceedings.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is unreported but is attached hereto as Appendix A. The Order of the United States Court of Appeals for the Ninth Circuit denying Petitioners' Motion for Rehearing was entered on May 8, 1973, and is attached hereto as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under provisions of 28 U.S.C., Sec. 1254(1) and Rule 19(b) of the Rules of the Supreme Court of the United States.

QUESTION PRESENTED

Was the affidavit for the warrant under which the search and seizure were conducted, which affidavit was by a Sheriff "on information and belief", relating matters not personally observed or known by him, and not identifying the source of his information, a sufficient basis for the action of the Magistrate in issuing the search warrant?

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Rule 41(c), Federal Rules of Criminal Procedure:

> Issuance and Contents. "A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in en-

forcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned."

Nevada Revised Statutes, Sec. 179.045(1):

"1. A search warrant shall issue only on affidavit or affidavits sworn to before the magistrate and establishing the grounds for issuing the warrant. If the magistrate is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he must issue a warrant identifying the property and naming or describing the person or place to be searched."

STATEMENT OF THE CASE

On August 5, 1971, the Sheriff of Lander County, Nevada, made application to a Magistrate of that county for a search warrant to search a truck later on connected to the Petitioners herein, in the form of an affidavit as follows:

"AFFIDAVIT FOR SEARCH WARRANT

"STATE OF NEVADA }
"COUNTY OF LANDER } SS.

"GEORGE E. SCHWIN, being first duly sworn, deposes and says on information and belief:

"1. Affiant has received reports of large-scale narcotics drops being made in southern Lander County.

"2. That on or about (sic) August 4, 1971, an aircraft was observed burning in a Dry Lake near Grass Valley in Lander County and investigation showed the fire to be of incendiary origin. Investigation also showed a portion of the unburned part of the aircraft cabin to contain small quantities of what appeared to be a dangerous drug, to-wit marijuana.

"3. That the type of aircraft involved had sufficient fuel capacity and carrying capacity to be used for large-scale transportation or importation of marijuana or other illicit drugs, and the quantity of gas in the aircraft fuel tanks indicated that a flight had been made of approximately 1000 miles, which distance is sufficient to represent a flight from Mexico. That the aircraft had been stripped of cargo and tire tracks led from the location on the dry lake where the aircraft had disabled its landing gear.

"4. That investigation further showed that the disablement of said aircraft occured on landing and the tire tracks aforesaid led to a 1960 white International Pick-up, Lic. No. WA 0882, 1971 License sticker No. 927641.

"5. That earlier reports of a vehicle or vehicles traveling in the area around the time the aircraft was discovered indicated a Washoe County tag.

"6. That there is in said vehicle, and apparent from external inspection several bags, plastic, of the sort used to transport marijuana and said bags contain what appears to be Mexican writing thereon.

"7. That said bags, if marijuana, would contain ap-

proximately 200 pounds of said drug and said drug in that condition emits a characteristic sweet smell such as the odor coming from said pickup.

"8. Said pickup and the contents thereof therefore constitute evidence that shows or tends to show that a public offense has been committed or that the above named defendants or others committed a public offense.

"WHEREFORE, affiant asks that a search warrant be issued for the above named 1960 white International Pickup and its camper and the environs of the downed aircraft and camper for marijuana or other dangerous drugs, any paraphernalia used in connection therewith and for any firearms or other equipment used or useful in the distribution and dissemination of dangerous drugs.

/s/ GEORGE E. SCHWIN
George E. Schwin

"Subscribed and sworn before me this 5th day of August, 1971.

/s/ E. CHARLES LEMAIRE
E. Charles Lemaire,
Justice of the Peace,
Lander County,
Argenta Township,
Nevada"

The Magistrate issued a search warrant and the Sheriff searched said vehicle and found a large quantity of marijuana which was received in evidence at the trial of the Petitioners.

On March 14, 1972, the Petitioners and others, were indicted for importing and conspiring to import marijuana into the United States from Mexico and for possession of marijuana with intent to distribute. Petitioners

entered a plea of not guilty and filed a timely Motion to Suppress the evidence, which said Motion was denied with leave to renew said Motion after trial. On July 7, 1972, the jury returned its verdict finding the Petitioners guilty of the three Counts in the indictment. On July 17, 1972, the United States District Court heard the renewal of the Petitioners' Motion to Suppress and entered its Order denying the same. The Petitioners timely filed their Notice of Appeal with the United States Court of Appeals for the Ninth Circuit on August 18, 1972. The fundamental issued raised by the appeal in the Ninth Circuit, was the sufficiency of the affidavit for a warrant for a vehicular search. On April 5, 1973, a three-judge panel of the United States Court of Appeals for the Ninth Circuit affirmed the conviction of the Petitioners herein. The Petitioners timely filed their Petition for Rehearing in the United States Court of Appeals for the Ninth Circuit and the same was denied on the 8th day of May, 1973.

ARGUMENT

AN AFFIDAVIT FOR A SEARCH WARRANT MADE ON INFORMATION AND BELIEF, BASED ENTIRELY ON HEARSAY, NOT IDENTIFYING THE SOURCE OF THE HEARSAY OR STATING WHY IT SHOULD BE CREDITED, AND NOT CONTAINING SUFFICIENT DETAIL TO BE FOUND INTERNALLY TRUSTWORTHY AND BASED ON PERSONAL OBSERVATION, DOES NOT ESTABLISH PROBABLE CAUSE FOR ISSUANCE OF THE WARRANT.

As mentioned under Statement of Facts, the affidavit was made by the Sheriff of Lander County, Nevada, who testified he had no personal knowledge of any of the facts

set forth in the affidavit and that the affidavit was prepared and typed by the District Attorney of the County and that he "probably" just glanced over the affidavit before he signed it.

The Fourth Amendment to the United States Constitution provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." *Rule 41(c), Federal Rules of Criminal Procedure*, provides, "A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof . . ." In exactly the same language, N.R.S. 179.045 provides, "A search warrant shall issue only on affidavit or affidavits sworn to before the magistrate and establishing the grounds for issuing the warrant. If the magistrate is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he must issue a warrant identifying the property and naming or describing the person or place to be searched . . . It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof . . ."

No person can swear to the truth of matters as to which he has no personal knowledge. The Fourth Amendment is not satisfied by anything less than "probable cause, supported by oath or affirmation." An affidavit purporting to have been made under oath, which is in fact made "on information and belief" does not rise above the level of hearsay and is palpably and fatally inadequate to support a warrant. In *Dow v Baird*, CA 10th, 389 F2d 882, the Court considered an affidavit for a search warrant prepared by a city attorney aided by a

county attorney, and purportedly executed by one Baird, a private citizen. Baird, not being placed under oath, signed the document in the city attorney's office in the presence of the sheriff. At the attorney's direction the sheriff took the document to the police judge who affixed his jurat thereon as if Baird had been present and under oath. The court held the search warrant was clearly and obviously invalid, stating:

> "The constitutional requirement that no search warrants 'shall issue but upon probable cause supported by Oath or affirmation' is not to be cavalierly brushed aside as an empty formality. It requires the interposition of an impartial, disinterested magistrate between the police and the citizen. When a magistrate, as in this case, acts as a mere rubber stamp for the police a basic constitutional protection with roots deep in our national history is reduced to so many empty words. That cannot be explained away, condoned, excused or tolerated. The search warrant was clearly and obviously invalid."

In *Nathanson v United States,* 290 US 41, 54 SCt 11, 78 LEd 159, it is said:

> "Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough."

In *Giordenello v United States,* 357 US 480, 78 SCt 1245, 2 LEd2d 1503, the court announced the guiding principle to be:

> "that the inferences from the facts which lead to the complaint '[must] be drawn by a neutral and

detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' Johnson v United States, 333 US 10, 14, 68 SCt 267, 369, 92 LEd 436. The purpose of the complaint, then, is to enable the appropriate magistrate * * * to determine whether the 'probable cause' required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion * * *."

In *Giordenello*, the complaint for the warrant did not pass muster because it contained "no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it [did] not indicate any sources for the complainant's belief; and it [did] not set forth any other sufficient basis upon which a finding of probable cause could be made."

In *Aguilar v State of Texas*, 370 US 114, 84 SCt 1509, 12 LEd2d 723, the court pointed out that the principles announced in Giordenello derived from the Fourth Amendment, and not from then Rule 4 of the Federal Rules of Criminal Procedure or the court's supervisory power.

In *Aguilar* a warrant was issued on an affidavit that affiants had "received reliable information from a credible person and do believe that * * * narcotics * * * are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law." The court stated:

"The vice in the present affidavit is at least as great as in Nathanson and Giordenello. Here the 'mere conclusion' that petitioner possessed narcotics was not even that of the affiant himself; it was that

of an unidentified informant. The affidavit here not only 'contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein,' it does not even contain an 'affirmative allegation' that the affiant's unidentified source 'spoke with personal knowledge.' For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession. The magistrate here certainly could not 'judge for himself the persuasiveness of the facts relied on * * * to show probable cause. He necessarily accepted 'without question' the informant's 'suspicion', 'belief' or 'mere conclusion.' "

In *Spinelli v United States,* 383 US 410, 89 SCt 584 21 LEd 637, the court made a further explication of the principles of *Aguilar* that (1) the affidavit for a search warrant must set forth underlying circumstances necessary to enable the magistrate to judge independently of the validity of the informant's conclusion and that (2) affiant-officers must support their claim that their informant was credible or his information reliable. In striking down the affidavit in *Spinelli,* the court pointed out that it was not retreating from established proposition that the standard of probable cause is the probability of criminal activity, not a prima facie showing, or such a showing as would govern admissibility of evidence at a trial; the language of *United States v Ventresca,* 380 US 102, 85 SCt 741, 13 LEd 684, that magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense; and that magisterial determinations are to be accorded deference by reviewing courts. Nevertheless, the court in *Spinelli* determined it could not sustain the warrant "without diluting important safeguards that assure that the judgment of a disinterested judicial officer will interpose itself between the police and the citizenry."

In *Whiteley v Warden*, 401 US 560, 91 SCt 1031, 28 LEd2d 306, a sheriff, acting on a tip, made a complaint charging the commission of a crime and an arrest warrant was issued. The fact that the basis for the Sheriff's complaint was an informer's tip, and other operative facts, were omitted from the complaint. The document was not sufficient to support the independent judgment of a disinterested magistrate. It was argued in support of the arrest made by other officers acting on a radio bulletin that a reviewing court should employ less stringent standards for reviewing a police officer's assessment of probable cause as a prelude to a warrantless arrest than the court would employ in reviewing a magistrate's assessment as a prelude to issuing an arrest or search warrant. The court rejected this argument in the following language:

> ". . . That proposition has been consistently rejected by this Court * * * (citing Ventresca, Aguilar, etc.) And the reason for its rejection is both fundamental and obvious: less stringent standards for reviewing the officer's discretion in effecting a warrantless arrest and search would discourage resort to the procedures for obtaining a warrant."

In the instant case, the requirements of *Aguilar* and *Spinelli* cannot be restricted merely to the disclosures of private informants, for the fundamental and obvious reasons, as stated in *Spinelli*, that to do so would dilute the important constitutional safeguards of an oath and probable cause which assure that the judgment of a disinterested judicial officer will interpose itself between the police and the citizenry.

In a radical departure from the requirements of the Fourth Amendment of the United States Constitution that a finding of probable cause must be supported by oath or affirmation, a three-judge panel of the Ninth Cir-

cuit (The Honorable Charles M. Merrill, Circuit Judge, who authored the opinion; the Honorable M. Oliver Koelsch, Circuit Judge, and the Honorable Gus J. Solomon, United States District Judge for the District of Oregon, concurred therein), has held, for the first time anywhere, that in an affidavit for a search warrant made *entirely* on information and belief, the internal details of the hearsay information set forth therein, are wholly self-proving of the following: (1) that the information was provided by law enforcement officers, (2) that the information was obtained in a reliable way, and (3) that the undisclosed persons who obtained the information in an undisclosed manner were credible and reliable.

This case involves a question of exceptional importance, and consideration by the full Court is necessary to secure and maintain uniformity of its decisions and the controlling decisions of the United States Supreme Court.

The opinion of the panel exceeds the permissible boundaries of the following controlling decisions:

> *Nathanson v United States,* 290 US 41, 54 SCt 11, 78 LEd 159; *Giordenello v United States,* 357 US 480, 78 SCt 1245, 2 LEd2d 1503; *Aguilar v State of Texas,* 370 US 114, 84 SCt 1509, 12 LEd2d 723; and *Spinelli v United States,* 393 US 410, 89 SCt 584, 21 LEd2d 637.

The constitutional error of the decision of the panel is comprehensible only from the viewpoint that the panel, like the trial judge, are unwilling to follow constitutional requirements which would overturn the present conviction of persons for the airlifting of a large quantity of marijuana from Mexico.

In an effort to give the affidavit a gloss of legitimacy, the panel says it agrees with the trial judge that "it is *apparent* and *implied* in this affidavit that the informa-

tion came to this affiant from other law enforcement officers who were engaged in an investigation." (Emphasis supplied.)

The panel opinion does not and cannot point to anything "apparent" in the affidavit to such effect. The affidavit does not state from what source the information was obtained.

The panel opinion says that the "nature and detail" of the hearsay "strongly indicate" that the investigation was official. But the internal details relied on by the panel — the incendiary origin of the aircraft fire, the nature of the disablement of the aircraft, its fuel and carrying capacity, and the quantity of fuel in its tank — are not matters of such arcane or limited usage as to be known and used only by law enforcement officers.

The panel's opinion quotes *United States v Ventresca*, 380 US 102, 85 SCt 741, 13 LEd2d 684, for the proposition that observations of fellow officers of the government engaged in a common investigation are a reliable basis for one of their number to apply for a warrant. What the panel overlooks to point out is that the circumstances of the official investigation were fully disclosed in the affidavit in *Ventresca*. In addition, also overlooked by the panel, is the circumstance that the affiant in *Ventresca* also swore in his affidavit that all the information therein was based on *his observations* and official reports made to him by fellow officers describing *their observations*.

The present affidavit, instead of being supportable under *Ventresca*, is patently, constitutionally insufficient under *Ventresca*.

Draper v United States, 358 US 307, 79 SCt 329, 3 LEd2d 327, cited by the panel, is *not* authority for the proposition urged by the panel that an internally detailed hearsay report is self-proving on all issues. Detail

may give a hearsay report probative value by lifting it above the level of casual rumor, but that detail still needs to be corroborated by the personal observation of somebody *under oath or affirmation. Draper* did not involve an affidavit for a warrant, but as pointed out in *Spinelli, Draper* does provide a measure for the necessity of and the quality of corroborative information:

> "Nor do we believe that the patent doubts *Aguilar* raises as to the report's reliability are adequately resolved by a consideration of the allegations detailing the FBI's independent investigative efforts. At most, these allegations indicated that *Spinelli* could have used the telephones specified by the informant for some purpose. This cannot by itself be said to support both the inference that the informer was generally trustworthy and that he had made his charge against *Spinelli* on the basis of information obtained in a reliable way. Once again, *Draper* provides a relevant comparison. Independent police work in that case corroborated much more than one small detail that had been provided by the informant."

The affiant in this case did not take an oath to anything on the basis of his own knowledge and his personal observations — he simply took an oath, on information and belief and recited the hearsay information, without any further statement as to the circumstances under which, or the persons from whom he had received the information.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be reversed and the case remanded for a new trial free of the errors committed.

Respectfully submitted:

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. BRAD SIMON BABICH, *Defendant-Appellant.*	No. 72-2744

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JAMES M. JOHNSON, *Defendant-Appellant.*	No. 72-2697

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JOHN T. SPANN, *Defendant-Appellant.*	No. 72-2698

On Appeal from the United States District Court
for the
District of Nevada

Before: MERRILL and KOELSCH, Circuit Judges,
and SOLOMON, District Judge*

* Honorable Gus J. Solomon, United States District Judge for the District of Oregon, sitting by designation.

MERRILL, Circuit Judge:

Appellants were convicted of conspiracy to import narcotics. The sole issue on appeal[1] is the sufficiency of an affidavit given in support of a search warrant. The validity of the warranted search is thus brought in question.

On August 4, 1971, an agent of the Nevada Department of Fish and Game discovered an airplane burning in a dry lake bed in Lander County, Nevada. He radioed his warden, who notified the sheriff of Lander County in Battle Mountain, who, in turn, called his deputy in Austin. The deputy and the warden then joined the Fish and Game agent at the scene and investigated the aircraft. The deputy returned to Austin and notified the Federal Bureau of Investigation and the Federal Aviation Administration. The following day an agent of the FBI and an agent of the FAA, accompanied by two deputy sheriffs, visited the scene and investigated the aircraft. They followed tracks leading from the scene and about two-and-one-half miles away came upon a deserted camper truck mired in mud. The back door was open and they could see a number of white sacks with Spanish words printed on them. From the interior came a strong smell of marijuana. Exercising admirable restraint, they decided to secure a search warrant. A deputy was left with the truck. The other returned to Austin where he telephoned to the sheriff and district attorney at Battle Mountain, reporting on the results of the investigations of aircraft and truck. An affidavit was then prepared by the district attorney and signed by the sheriff. In reliance on the affidavit a search warrant was issued by the justice of the peace in Battle Mountain. The sheriff returned to

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[1] Other issues were argued which we do not find it necessary to reach.

the mired truck at about midnight and the following day the truck was searched and marijuana was recovered.

The District Court denied a motion to suppress and following trial and judgment of conviction this appeal was taken.

The affidavit given by the sheriff to the justice of the peace read as follows:

> "GEORGE E. SCHWIN, being first duly sworn, deposes and says on information and belief:
>
> 1. Affiant has received reports of large-scale narcotics drops being made in southern Lander County.
>
> 2. That on or about August 4, 1971, an aircraft was observed burning in a Dry Lake near Grass Valley in Lander County and investigation showed the fire to be of incendiary origin. Investigation also showed a portion of the unburned part of the aircraft cabin to contain small quantities of what appeared to be a dangerous drug, to-wit marijuana.
>
> 3. That the type of aircraft involved had sufficient fuel capacity and carrying capacity to be used for large-scale transportation or importation of marijuana or other illicit drugs, and the quantity of gas in the aircraft fuel tanks indicated that a flight had been made of approximately 1000 miles, which distance is sufficient to represent a flight from Mexico. That the aircraft had been stripped of cargo and tire tracks led from the location on the dry lake where the aircraft had disabled its landing gear.
>
> 4. That investigation further showed that the disablement of said aircraft occurred on landing and the tire tracks aforesaid led to a 1960 white International Pickup. Lic. No. WA 0882, 1971 License sticker No. 927641.

5. That earlier reports of a vehicle or vehicles traveling in the area around the time the aircraft was discovered indicated a Washoe County tag.

6. That there is in said vehicle, and apparent from external inspection several bags, plastic, of the sort used to transport marijuana and said bags contained what appears to be Mexican writing thereon.

7. That said bags, if marijuana, would contain approximately 200 pounds of said drug and said drug in that condition emits a characteristic sweet smell such as the odor coming from said pickup.

8. Said pickup and the contents thereof therefore constitute evidence that shows or tends to show that a public offense has been committed or that the above named defendants or others committed a public offense.

WHEREFORE, affiant asks that a search warrant be isued for the above named 1960 white International Pickup and its camper and the environs of the downed aircraft and camper for marijuana or other dangerous drugs, any paraphernalia used in connection therewith and for any firearms or other equipment used or useful in the distribution and dissemination of dangerous drugs.

/s/ GEORGE E. SCHWIN

George E. Schwin"

Relying upon Aguilar v. Texas, 378 U.S. 108 (1964), appellants attack the sufficiency of the affidavit upon the ground that it is entirely given upon information and belief and fails to disclose the identity of the informant and the basis for a belief that he was reliable.

In denying motion to suppress the District Court stated:

> "I think it is apparent and implied in this affidavit that the information came to this affiant from other law enforcement officers who were engaged in an investigation."

We agree. In *United States v Ventresca*, 308 U.S. 101, 111 (1965), the Court stated:

> "* * * upon reading the affidavit as a whole, it becomes clear that the detailed observations recounted in the affidavit cannot fairly be regarded as having been made in any significant part by persons other than full-time Investigators of the Alcohol and Tobacco Tax Division of the Internal Revenue Service. Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number."

In *Spinelli v United States*, 393, U.S. 410 (1969), the Court found detail lacking in the affidavit; but at the same time the Court pointed to *Draper v United States*, 358 U.S. 307 (1959), as a case where "A magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way." *Spinelli v United States*, 393 U.S. 410, 417 (1969).

Here the nature and detail of the disclosures of the "investigation" — as to the incendiary origin of the aircraft fire, as to the nature of the disablement of the aircraft, as to its fuel and carrying capacity, and the quantity of fuel in its tank — all strongly indicate that the investigation was official.

Judgment affirmed.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. BRAD SIMON BABICH, *Defendant-Appellant.*	No. 72-2744

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JAMES M. JOHNSON, *Defendant-Appellant.*	No. 72-2697

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JOHN T. SPANN, *Defendant-Appellant.*	No. 72-2698

On Petition for Rehearing

Before: MERRILL and KOELSCH, Circuit Judges
and SOLOMON, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has re-

quested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

1654 FILE COPY

Supreme Court, U. S.
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IN THE
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October Term, 1973

NO. 72-1654

JOHN T. SPANN,
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v.

UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To The
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FOR THE NINTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. _____

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PETITION FOR WRIT OF CERTIORARI

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Whiteley v Warden, 401 U.S. 560, 91 SCt 1031, 28 LEd 306 11

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. _____

JOHN T. SPANN,
Petitioner,

v.

UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To The
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, JOHN T. SPANN, prays that a Writ of Certiorari issue to review the final Order and Judgment of the United States Court of Appeals for the Ninth Circuit rendered in these proceedings.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is unreported but is attached hereto as Appendix A. The Order of the United States Court of Appeals for the Ninth Circuit denying Petitioner's Motion for Rehearing was entered on May 8, 1973, and is attached hereto as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under provisions of 28 U.S.C., Sec. 1254(1) and Rule 19(b) of the Rules of the Supreme Court of the United States.

QUESTION PRESENTED

Was the affidavit for the warrant under which the search and seizure were conducted, which affidavit was by a Sheriff "on information and belief", relating matters not personally observed or known by him, and not identifying the source of his information, a sufficient basis for the action of the Magistrate in issuing the search warrant?

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Rule 41(c), Federal Rules of Criminal Procedure:

> Issuance and Contents. "A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in en-

forcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned."

Nevada Revised Statutes, Sec. 179.045(1):

"1. A search warrant shall issue only on affidavit or affidavits sworn to before the magistrate and establishing the grounds for issuing the warrant. If the magistrate is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he must issue a warrant identifying the property and naming or describing the person or place to be searched."

STATEMENT OF THE CASE

On August 5, 1971, the Sheriff of Lander County, Nevada, made application to a Magistrate of that county for a search warrant to search a truck later on connected to the Petitioner herein, in the form of an affidavit as follows:

"AFFIDAVIT FOR SEARCH WARRANT

"STATE OF NEVADA }
"COUNTY OF LANDER } SS.

"GEORGE E. SCHWIN, being first duly sworn, deposes and says on information and belief:

"1. Affiant has received reports of large-scale narcotics drops being made in southern Lander County.

"2. That on or about (sic) August 4, 1971, an aircraft was observed burning in a Dry Lake near Grass Valley in Lander County and investigation showed the fire to be of incendiary origin. Investigation also showed a portion of the unburned part of the aircraft cabin to contain small quantities of what appeared to be a dangerous drug, to-wit marijuana.

"3. That the type of aircraft involved had sufficient fuel capacity and carrying capacity to be used for large-scale transportation or importation of marijuana or other illicit drugs, and the quantity of gas in the aircraft fuel tanks indicated that a flight had been made of approximately 1000 miles, which distance is sufficient to represent a flight from Mexico. That the aircraft had been stripped of cargo and tire tracks led from the location on the dry lake where the aircraft had disabled its landing gear.

"4. That investigation further showed that the disablement of said aircraft occured on landing and the tire tracks aforesaid led to a 1960 white International Pickup, Lic. No. WA 0882, 1971 License sticker No. 927641.

"5. That earlier reports of a vehicle or vehicles traveling in the area around the time the aircraft was discovered indicated a Washoe County tag.

"6. That there is in said vehicle, and apparent from external inspection several bags, plastic, of the sort used to transport marijuana and said bags contain what appears to be Mexican writing thereon.

"7. That said bags, if marijuana, would contain ap-

proximately 200 pounds of said drug and said drug in that condition emits a characteristic sweet smell such as the odor coming from said pickup.

"8. Said pickup and the contents thereof therefore constitute evidence that shows or tends to show that a public offense has been committed or that the above named defendants or others committed a public offense.

"WHEREFORE, affiant asks that a search warrant be issued for the above named 1960 white International Pickup and its camper and the environs of the downed aircraft and camper for marijuana or other dangerous drugs, any paraphernalia used in connection therewith and for any firearms or other equipment used or useful in the distribution and dissemination of dangerous drugs.

/s/ GEORGE E. SCHWIN
George E. Schwin

"Subscribed and sworn before me this 5th day of August, 1971.

/s/ E. CHARLES LEMAIRE
E. Charles Lemaire,
Justice of the Peace,
Lander County,
Argenta Township,
Nevada"

The Magistrate issued a search warrant and the Sheriff searched said vehicle and found a large quantity of marijuana which was received in evidence at the trial of the Petitioner.

On March 14, 1972, the Petitioner and others, was indicted for importing and conspiring to import marijuana into the United States from Mexico and for possession of marijuana with intent to distribute. Petitioner

entered a plea of not guilty and filed a timely Motion to Suppress the evidence, which said Motion was denied with leave to renew said Motion after trial. On July 7, 1972, the jury returned its verdict finding the Petitioner guilty of the two Counts in the indictment. On July 17, 1972, the United States District Court heard the renewal of the Petitioner's Motion to Suppress and entered its Order denying the same. The Petitioner timely filed his Notice of Appeal with the United States Court of Appeals for the Ninth Circuit on August 18, 1972. The fundamental issued raised by the appeal in the Ninth Circuit, was the sufficiency of the affidavit for a warrant for a vehicular search. On April 5, 1973, a three-judge panel of the United States Court of Appeals for the Ninth Circuit affirmed the conviction of the Petitioner herein. The Petitioner timely filed his Petition for Rehearing in the United States Court of Appeals for the Ninth Circuit and the same was denied on the 8th day of May, 1973.

ARGUMENT

AN AFFIDAVIT FOR A SEARCH WARRANT MADE ON INFORMATION AND BELIEF, BASED ENTIRELY ON HEARSAY, NOT IDENTIFYING THE SOURCE OF THE HEARSAY OR STATING WHY IT SHOULD BE CREDITED, AND NOT CONTAINING SUFFICIENT DETAIL TO BE FOUND INTERNALLY TRUSTWORTHY AND BASED ON PERSONAL OBSERVATION, DOES NOT ESTABLISH PROBABLE CAUSE FOR ISSUANCE OF THE WARRANT.

As mentioned under Statement of Facts, the affidavit was made by the Sheriff of Lander County, Nevada, who testified he had no personal knowledge of any of the facts

set forth in the affidavit and that the affidavit was prepared and typed by the District Attorney of the County and that he "probably" just glanced over the affidavit before he signed it.

The Fourth Amendment to the United States Constitution provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." *Rule 41(c), Federal Rules of Criminal Procedure*, provides, "A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof . . ." In exactly the same language, N.R.S. 179.045 provides, "A search warrant shall issue only on affidavit or affidavits sworn to before the magistrate and establishing the grounds for issuing the warrant. If the magistrate is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he must issue a warrant identifying the property and naming or describing the person or place to be searched . . . It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof . . ."

No person can swear to the truth of matters as to which he has no personal knowledge. The Fourth Amendment is not satisfied by anything less than "probable cause, supported by oath or affirmation." An affidavit purporting to have been made under oath, which is in fact made "on information and belief" does not rise above the level of hearsay and is palpably and fatally inadequate to support a warrant. In *Dow v Baird*, CA 10th, 389 F2d 882, the Court considered an affidavit for a search warrant prepared by a city attorney aided by a

county attorney, and purportedly executed by one Baird, a private citizen. Baird, not being placed under oath, signed the document in the city attorney's office in the presence of the sheriff. At the attorney's direction the sheriff took the document to the police judge who affixed his jurat thereon as if Baird had been present and under oath. The court held the search warrant was clearly and obviously invalid, stating:

> "The constitutional requirement that no search warrants 'shall issue but upon probable cause supported by Oath or affirmation' is not to be cavalierly brushed aside as an empty formality. It requires the interposition of an impartial, disinterested magistrate between the police and the citizen. When a magistrate, as in this case, acts as a mere rubber stamp for the police a basic constitutional protection with roots deep in our national history is reduced to so many empty words. That cannot be explained away, condoned, excused or tolerated. The search warrant was clearly and obviously invalid."

In *Nathanson v United States,* 290 US 41, 54 SCt 11, 78 LEd 159, it is said:

> "Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough."

In *Giordenello v United States,* 357 US 480, 78 SCt 1245, 2 LEd2d 1503, the court announced the guiding principle to be:

> "that the inferences from the facts which lead to the complaint '[must] be drawn by a neutral and

> detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' Johnson v United States, 333 US 10, 14, 68 SCt 267, 369, 92 LEd 436. The purpose of the complaint, then, is to enable the appropriate magistrate * * * to determine whether the 'probable cause' required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion * * *."

In *Giordenello*, the complaint for the warrant did not pass muster because it contained "no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it [did] not indicate any sources for the complainant's belief; and it [did] not set forth any other sufficient basis upon which a finding of probable cause could be made."

In *Aguilar v State of Texas*, 370 US 114, 84 SCt 1509, 12 LEd2d 723, the court pointed out that the principles announced in Giordenello derived from the Fourth Amendment, and not from then Rule 4 of the Federal Rules of Criminal Procedure or the court's supervisory power.

In *Aguilar* a warrant was issued on an affidavit that affiants had "received reliable information from a credible person and do believe that * * * narcotics * * * are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law." The court stated:

> "The vice in the present affidavit is at least as great as in Nathanson and Giordenello. Here the 'mere conclusion' that petitioner possessed narcotics was not even that of the affiant himself; it was that

of an unidentified informant. The affidavit here not only 'contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein,' it does not even contain an 'affirmative allegation' that the affiant's unidentified source 'spoke with personal knowledge.' For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession. The magistrate here certainly could not 'judge for himself the persuasiveness of the facts relied on * * * to show probable cause. He necessarily accepted 'without question' the informant's 'suspicion', 'belief' or 'mere conclusion.' "

In *Spinelli v United States*, 383 US 410, 89 SCt 584 21 LEd 637, the court made a further explication of the principles of *Aguilar* that (1) the affidavit for a search warrant must set forth underlying circumstances necessary to enable the magistrate to judge independently of the validity of the informant's conclusion and that (2) affiant-officers must support their claim that their informant was credible or his information reliable. In striking down the affidavit in *Spinelli*, the court pointed out that it was not retreating from established proposition that the standard of probable cause is the probability of criminal activity, not a prima facie showing, or such a showing as would govern admissibility of evidence at a trial; the language of *United States v Ventresca*, 380 US 102, 85 SCt 741, 13 LEd 684, that magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense; and that magisterial determinations are to be accorded deference by reviewing courts. Nevertheless, the court in *Spinelli* determined it could not sustain the warrant "without diluting important safeguards that assure that the judgment of a disinterested judicial officer will interpose itself between the police and the citizenry."

In *Whiteley v Warden,* 401 US 560, 91 SCt 1031, 28 LEd2d 306, a sheriff, acting on a tip, made a complaint charging the commission of a crime and an arrest warrant was issued. The fact that the basis for the Sheriff's complaint was an informer's tip, and other operative facts, were omitted from the complaint. The document was not sufficient to support the independent judgment of a disinterested magistrate. It was argued in support of the arrest made by other officers acting on a radio bulletin that a reviewing court should employ less stringent standards for reviewing a police officer's assessment of probable cause as a prelude to a warrantless arrest than the court would employ in reviewing a magistrate's assessment as a prelude to issuing an arrest or search warrant. The court rejected this argument in the following language:

> ". . . That proposition has been consistently rejected by this Court * * * (citing Ventresca, Aguilar, etc.) And the reason for its rejection is both fundamental and obvious: less stringent standards for reviewing the officer's discretion in effecting a warrantless arrest and search would discourage resort to the procedures for obtaining a warrant."

In the instant case, the requirements of *Aguilar* and *Spinelli* cannot be restricted merely to the disclosures of private informants, for the fundamental and obvious reasons, as stated in *Spinelli,* that to do so would dilute the important constitutional safeguards of an oath and probable cause which assure that the judgment of a disinterested judicial officer will interpose itself between the police and the citizenry.

In a radical departure from the requirements of the Fourth Amendment of the United States Constitution that a finding of probable cause must be supported by oath or affirmation, a three-judge panel of the Ninth Cir-

cuit (The Honorable Charles M. Merrill, Circuit Judge, who authored the opinion; the Honorable M. Oliver Koelsch, Circuit Judge, and the Honorable Gus J. Solomon, United States District Judge for the District of Oregon, concurred therein), has held, for the first time anywhere, that in an affidavit for a search warrant made *entirely* on information and belief, the internal details of the hearsay information set forth therein, are wholly self-proving of the following: (1) that the information was provided by law enforcement officers, (2) that the information was obtained in a reliable way, and (3) that the undisclosed persons who obtained the information in an undisclosed manner were credible and reliable.

This case involves a question of exceptional importance, and consideration by the full Court is necessary to secure and maintain uniformity of its decisions and the controlling decisions of the United States Supreme Court.

The opinion of the panel exceeds the permissible boundaries of the following controlling decisions:

> *Nathanson v United States,* 290 US 41, 54 SCt 11, 78 LEd 159; *Giordenello v United States,* 357 US 480, 78 SCt 1245, 2 LEd2d 1503; *Aguilar v State of Texas,* 370 US 114, 84 SCt 1509, 12 LEd2d 723; and *Spinelli v United States,* 393 US 410, 89 SCt 584, 21 LEd2d 637.

The constitutional error of the decision of the panel is comprehensible only from the viewpoint that the panel, like the trial judge, are unwilling to follow constitutional requirements which would overturn the present conviction of persons for the airlifting of a large quantity of marijuana from Mexico.

In an effort to give the affidavit a gloss of legitimacy, the panel says it agrees with the trial judge that "it is *apparent* and *implied* in this affidavit that the informa-

tion came to this affiant from other law enforcement officers who were engaged in an investigation." (Emphasis supplied.)

The panel opinion does not and cannot point to anything "apparent" in the affidavit to such effect. The affidavit does not state from what source the information was obtained.

The panel opinion says that the "nature and detail" of the hearsay "strongly indicate" that the investigation was official. But the internal details relied on by the panel — the incendiary origin of the aircraft fire, the nature of the disablement of the aircraft, its fuel and carrying capacity, and the quantity of fuel in its tank — are not matters of such arcane or limited usage as to be known and used only by law enforcement officers.

The panel's opinion quotes *United States v Ventresca*, 380 US 102, 85 SCt 741, 13 LEd2d 684, for the proposition that observations of fellow officers of the government engaged in a common investigation are a reliable basis for one of their number to apply for a warrant. What the panel overlooks to point out is that the circumstances of the official investigation were fully disclosed in the affidavit in *Ventresca*. In addition, also overlooked by the panel, is the circumstance that the affiant in *Ventresca* also swore in his affidavit that all the information therein was based on *his observations* and official reports made to him by fellow officers describing *their observations*.

The present affidavit, instead of being supportable under *Ventresca*, is patently, constitutionally insufficient under *Ventresca*.

Draper v United States, 358 US 307, 79 SCt 329, 3 LEd2d 327, cited by the panel, is *not* authority for the proposition urged by the panel that an internally detailed hearsay report is self-proving on all issues. Detail

may give a hearsay report probative value by lifting it above the level of casual rumor, but that detail still needs to be corroborated by the personal observation of somebody *under oath or affirmation. Draper* did not involve an affidavit for a warrant, but as pointed out in *Spinelli, Draper* does provide a measure for the necessity of and the quality of corroborative information:

> "Nor do we believe that the patent doubts *Aguilar* raises as to the report's reliability are adequately resolved by a consideration of the allegations detailing the FBI's independent investigative efforts. At most, these allegations indicated that *Spinelli* could have used the telephones specified by the informant for some purpose. This cannot by itself be said to support both the inference that the informer was generally trustworthy and that he had made his charge against *Spinelli* on the basis of information obtained in a reliable way. Once again, *Draper* provides a relevant comparison. Independent police work in that case corroborated much more than one small detail that had been provided by the informant."

The affiant in this case did not take an oath to anything on the basis of his own knowledge and his personal observations — he simply took an oath, on information and belief and recited the hearsay information, without any further statement as to the circumstances under which, or the persons from whom he had received the information.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be reversed and the case remanded for a new trial free of the errors committed.

Respectfully submitted:

JOHN G. SPANN
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302 East Cason Avenue
Las Vegas, Nevada 89101

Attorney for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* **vs.** BRAD SIMON BABICH, *Defendant-Appellant.*	No. 72-2744
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* **vs.** JAMES M. JOHNSON, *Defendant-Appellant.*	No. 72-2697
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* **vs.** JOHN T. SPANN, *Defendant-Appellant.*	No. 72-2698

On Appeal from the United States District Court
for the
District of Nevada

Before: MERRILL and KOELSCH, Circuit Judges,
and SOLOMON, District Judge*

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* Honorable Gus J. Solomon, United States District Judge for the District of Oregon, sitting by designation.

MERRILL, Circuit Judge:

Appellants were convicted of conspiracy to import narcotics. The sole issue on appeal[1] is the sufficiency of an affidavit given in support of a search warrant. The validity of the warranted search is thus brought in question.

On August 4, 1971, an agent of the Nevada Department of Fish and Game discovered an airplane burning in a dry lake bed in Lander County, Nevada. He radioed his warden, who notified the sheriff of Lander County in Battle Mountain, who, in turn, called his deputy in Austin. The deputy and the warden then joined the Fish and Game agent at the scene and investigated the aircraft. The deputy returned to Austin and notified the Federal Bureau of Investigation and the Federal Aviation Administration. The following day an agent of the FBI and an agent of the FAA, accompanied by two deputy sheriffs, visited the scene and investigated the aircraft. They followed tracks leading from the scene and about two-and-one-half miles away came upon a deserted camper truck mired in mud. The back door was open and they could see a number of white sacks with Spanish words printed on them. From the interior came a strong smell of marijuana. Exercising admirable restraint, they decided to secure a search warrant. A deputy was left with the truck. The other returned to Austin where he telephoned to the sheriff and district attorney at Battle Mountain, reporting on the results of the investigations of aircraft and truck. An affidavit was then prepared by the district attorney and signed by the sheriff. In reliance on the affidavit a search warrant was issued by the justice of the peace in Battle Mountain. The sheriff returned to

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[1] Other issues were argued which we do not find it necessary to reach.

the mired truck at about midnight and the following day the truck was searched and marijuana was recovered.

The District Court denied a motion to suppress and following trial and judgment of conviction this appeal was taken.

The affidavit given by the sheriff to the justice of the peace read as follows:

> "GEORGE E. SCHWIN, being first duly sworn, deposes and says on information and belief:
>
> 1. Affiant has received reports of large-scale narcotics drops being made in southern Lander County.
>
> 2. That on or about August 4, 1971, an aircraft was observed burning in a Dry Lake near Grass Valley in Lander County and investigation showed the fire to be of incendiary origin. Investigation also showed a portion of the unburned part of the aircraft cabin to contain small quantities of what appeared to be a dangerous drug, to-wit marijuana.
>
> 3. That the type of aircraft involved had sufficient fuel capacity and carrying capacity to be used for large-scale transportation or importation of marijuana or other illicit drugs, and the quantity of gas in the aircraft fuel tanks indicated that a flight had been made of approximately 1000 miles, which distance is sufficient to represent a flight from Mexico. That the aircraft had been stripped of cargo and tire tracks led from the location on the dry lake where the aircraft had disabled its landing gear.
>
> 4. That investigation further showed that the disablement of said aircraft occurred on landing and the tire tracks aforesaid led to a 1960 white International Pickup. Lic. No. WA 0882, 1971 License sticker No. 927641.

5. That earlier reports of a vehicle or vehicles traveling in the area around the time the aircraft was discovered indicated a Washoe County tag.

6. That there is in said vehicle, and apparent from external inspection several bags, plastic, of the sort used to transport marijuana and said bags contained what appears to be Mexican writing thereon.

7. That said bags, if marijuana, would contain approximately 200 pounds of said drug and said drug in that condition emits a characteristic sweet smell such as the odor coming from said pickup.

8. Said pickup and the contents thereof therefore constitute evidence that shows or tends to show that a public offense has been committed or that the above named defendants or others committed a public offense.

WHEREFORE, affiant asks that a search warrant be isued for the above named 1960 white International Pickup and its camper and the environs of the downed aircraft and camper for marijuana or other dangerous drugs, any paraphernalia used in connection therewith and for any firearms or other equipment used or useful in the distribution and dissemination of dangerous drugs.

/s/ GEORGE E. SCHWIN

George E. Schwin"

Relying upon Aguilar v. Texas, 378 U.S. 108 (1964), appellants attack the sufficiency of the affidavit upon the ground that it is entirely given upon information and belief and fails to disclose the identity of the informant and the basis for a belief that he was reliable.

In denying motion to suppress the District Court stated:

> "I think it is apparent and implied in this affidavit that the information came to this affiant from other law enforcement officers who were engaged in an investigation."

We agree. In *United States v Ventresca*, 308 U.S. 101, 111 (1965), the Court stated:

> "* * * upon reading the affidavit as a whole, it becomes clear that the detailed observations recounted in the affidavit cannot fairly be regarded as having been made in any significant part by persons other than full-time Investigators of the Alcohol and Tobacco Tax Division of the Internal Revenue Service. Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number."

In *Spinelli v United States*, 393, U.S. 410 (1969), the Court found detail lacking in the affidavit; but at the same time the Court pointed to *Draper v United States*, 358 U.S. 307 (1959), as a case where "A magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way." *Spinelli v United States*, 393 U.S. 410, 417 (1969).

Here the nature and detail of the disclosures of the "investigation" — as to the incendiary origin of the aircraft fire, as to the nature of the disablement of the aircraft, as to its fuel and carrying capacity, and the quantity of fuel in its tank — all strongly indicate that the investigation was official.

Judgment affirmed.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* **vs.** BRAD SIMON BABICH, *Defendant-Appellant.*	No. 72-2744

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* **vs.** JAMES M. JOHNSON, *Defendant-Appellant.*	No. 72-2697

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* **vs.** JOHN T. SPANN, *Defendant-Appellant.*	No. 72-2698

On Petition for Rehearing

Before: MERRILL and KOELSCH, Circuit Judges
and SOLOMON, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has re-

quested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1639

BRAD SIMON BABICH AND JAMES M. JOHNSON, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 72-1654

JOHN T. SPANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners argue that a search warrant, pursuant to which 664 pounds of marijuana were found and admitted into evidence, was invalid because the underlying affidavit executed by a law enforcement officer was insufficient.

A three count indictment returned in the United States District Court for the District of Nevada, charged petitioners with having conspired to import marijuana into the United States, with having imported marijuana

into the United States from Mexico, and with having possessed marijuana with intent to distribute, in violation of 21 U.S.C. 952(a), 960(a)(1), 841 and 18 U.S.C. 2. Following a jury trial, petitioners Babich and Johnson, petitioners in No. 72-1639, were convicted on all three counts. The possession count (Count 3) was dismissed as to Spann, petitioner in No. 72-1654, and he was convicted under the remaining counts. Babich was sentenced to five years' imprisonment followed by a five year parole term; Johnson to three years' imprisonment and three years' parole; and Spann to six months' imprisonment followed by four and one-half years' probation. The court of appeals affirmed on April 5, 1973 (Pets. Apps. A) and denied a petition for rehearing with a suggestion for rehearing *en banc* on May 8, 1973.[1]

Regarding the search and seizure, the evidence at trial and at the hearing on the motion to suppress showed the following.

On August 4, 1971, an agent of the Nevada Department of Fish and Game observed an airplane burning in a dry lake bed in Lander County, Nevada (Tr. I, 109).[2] He radioed his warden, who notified the sheriff of Lander County in Battle Mountain, who, in turn, called his deputy in Austin. The deputy and the warden then joined the Fish and Game agent at the scene and investigated the aircraft (Tr. IV, 824-829). In one of

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[1] The joint petition for certiorari of petitioners Babich and Johnson was timely filed. The separate petition for certiorari of petitioner Spann was not filed until June 9, 1973; it is therefore out of time under Rule 22(2) of the Rules of this Court.

[2] The transcript is in seven columes, a copy of which is lodged herewith. It is hereinafter referred to by the notations Tr. I through VII.

the plane's empty baggage compartments they found remnants of marijuana seeds and stems (Tr. IV, 831-833). The officers also observed that the identification numbers of the plane had been altered by tape and saw vehicle tracks leading northerly and southerly from the crash site (Tr. IV, 843-849).

Later that day an F.B.I. agent and an agent of the Federal Aviation Administration (FAA), accompanied by two deputy Sheriffs, visited the scene of the crash. After having thoroughly investigated the aircraft, they followed the tire tracks leading north from the scene and, about two-and-one-half miles away found a deserted camper truck mired in mud. The back door had been broken open and they could see a number of white sacks with Spanish words printed on them. From the interior came a strong smell of marijuana (Tr. IV, 858-862). The officers did not immediately search the truck. They decided instead to first secure a search warrant (Tr. IV, 863). One deputy Sheriff stayed with the truck while the other returned to Austin and telephoned the results of the investigations of the aircraft and truck to Sheriff Schwin (who had been previously advised of the ongoing investigation), and the district attorney at Battle Mountain. An affidavit was then prepared by the district attorney and signed by the Sheriff. It read as follows:

> "GEORGE E. SCHWIN, being first duly sworn, deposes and says on information and belief:
>
> 1. Affiant has received reports of large-scale narcotics drops being made in southern Lander County.
>
> 2. That on or about August 4, 1971, an aircraft was observed burning in a Dry Lake near Grass

Valley in Lander County and investigation showed the fire to be of incendiary origin. Investigation also showed a portion of the unburned part of the aircraft cabin to contain small quantities of what appeared to be a dangerous drug, to-wit marijuana.

3. That the type of aircraft involved had sufficient fuel capacity and carrying capacity to be used for large-scale transportation or importation of marijuana or other illicit drugs, and the quantity of gas in the aircraft fuel tanks indicated that a flight had been made of approximately 1000 miles, which distance is sufficient to represent a flight from Mexico. That the aircraft had been stripped of cargo and tire tracks led from the location on the dry lake where the aircraft had disabled its landing gear.

4. That investigation further showed that the disablement of said aircraft occurred on landing and the tire tracks aforesaid led to a 1960 White International Pickup. Lic. No. WA 0882, 1971 License sticker No. 927641.

5. That earlier reports of a vehicle or vehicles traveling in the area around the time the aircraft was discovered indicated a Washoe County tag.

6. That there is in said vehicle, and apparent from external inspection several bags, plastic, of the sort used to transport marijuana and said bags contain what appears to be Mexican writing thereon.

7. That said bags, if marijuana, would contain approximately 200 pounds of said drug and said drug in that condition emits a characteristic sweet smell such as the odor coming from said pickup.

8. Said pickup and the contents thereof therefore constitute evidence that shows or tends to show that a public offense has been committed or that the above named defendants or others committed a public offense.

WHEREFORE, affiant asks that a search warrant be issued for the above name 1960 White International Pickup and its camper and the environs of the downed aircraft and camper for marijuana or other dangerous drugs, any paraphernalia used in connection therewith and for any firearms or other equipment used or useful in the distribution and dissemination of dangerous drugs.

Based upon this affidavit, a search warrant was issued by the justice of the peace at Battle Mountain. The Sheriff returned to the mired truck at about midnight, August 5, and the following day the truck was searched and the 664 pounds of marijuana was seized (Tr. IV, 867-868).

Petitioners' challenge to the validity of the affidavit is without merit. They do not dispute that the information, if believed, establishes probable cause; rather, they attack its reliability, claiming that the affidavit, given upon "information and belief," is fatally defective because it does not specifically describe the persons from whom, or the circumstances under which the information was derived.

As the court below pointed out, information from fellow officers engaged in a common investigation is plainly a reliable basis to support a warrant, *United States* v. *Ventresca*, 380 U.S. 102, 111. Here, the affidavit refers to reports, to investigation and to inspection, and explicitly says the "investigation showed" and that reports were received by affiant, a law enforce-

ment officer. It is also implicit from the nature of the disclosures (*i.e.*, the incendiary origin of the fire, the carrying capacity of the aircraft, the quantity of gas in the tanks, etc.), that such observations could only have been made by official investigators. Moreover, the detailed nature of this information is itself an indication of its reliability. Cf. *Draper* v. *United States,* 358 U.S. 307.

Additionally, we note that the investigating officers lawfully could have searched the truck when they found it. See, *e.g., Chambers* v. *Maroney,* 399 U.S. 42; *Carroll* v. *United States,* 267 U.S. 132.[3] They chose instead—despite considerable inconvenience and about ten hours delay—to obtain a search warrant. To encourage precisely such action on the part of law enforcement officers, this Court has consistently expressed its preference for searches with warrants, as opposed to those without. See, *United States* v. *Ventresca,* 380 U.S. 102, 106; *Jones* v. *United States,* 362 U.S. 257, 270. Given the inherent reliability of the disclosures in the instant affidavit, coupled with the overriding policy in favor of obtaining search warrants in circumstances such as are present here, we submit that the courts below properly upheld the validity of the warrant.

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[3] Indeed, the circumstances would have justified such an on-the-spot search. The marijuana stems and seeds found in the plane; the tire tracks leading from the plane to the truck; the bags with Spanish writing on them seen in the truck; and the strong smell of marijuana emanating therefrom, amounted to more than probable cause to believe that the truck contained marijuana. Exigent circumstances existed as well. As the district court found (at page 6-7 of its order denying the motion to suppress) "While the truck was mired in the mud, it could be dug and towed out without too much difficulty. It would have been the height of carelessness and inefficiency to have abandoned the truck in the remote Nevada desert until a search warrant could be obtained. Seizures of vehicles under like circumstances have been uniformly sustained [citations omitted]."

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.